Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

HUB ELECTRIC COMPANY, INC.,
Plaintiff-Appellee
Cross-Appellant,

v.

GUST CONSTRUCTION COMPANY, INC. and AETNA CASUALTY AND SURETY COMPANY,
Defendants-Appellants
Cross-Appellees.

78-1094

APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT
File Nos. 76-2607 and 76-2608
BEFORE: Weick, Edwards and Engel, Circuit Judges

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

HUB ELECTRIC COMPANY, INC.,
Plaintiff-Appellee
Cross-Appellant,

-vs-

GUST CONSTRUCTION COMPANY, INC. AND AETNA CASUALTY AND SURETY COMPANY,
Defendants-Appellants
Cross-Appellees.

PETITION FOR WRIT OF CERTIORARI

NOW COME Gust Construction Company, Inc. and Aetna Casualty and Surety Company and in support of their Petition for Writ of Certiorari show as follows:

1. The pertinent official and unofficial reports of the Opinions delivered by the Courts below are appended as follows:

a) Order and Memorandum Opinion dated August 4, 1975, from The Honorable James Harvey, United States District Court, Eastern District of Michigan, Northern Division.

b) Memorandum Opinion and Order dated August 19, 1976, from The Honorable James Harvey, United States District Court, Eastern District of Michigan, Northern Division.

c) Opinion dated October 13, 1978, from the United States Court of Appeals for the Sixth Circuit.

2. The grounds for invoking the jurisdiction of this Court are as follows:

a) On October 13, 1978, a Judgment of the United States Court of Appeals for the Sixth Circuit was rendered against Defendants-Appellants.

b) Time for filing for a Writ of Certiorari has not expired.

c) 28 USC Sec. 1254(1) permits review by Certiorari of any case decided in a United States Court of Appeals.

3. The questions presented for review are as follows:

a) Did the United States Court of Appeals err in reversing the decision of the Federal District Court in finding that the Plaintiff bond claimant must comply merely with the terms of the bond, and need not comply with the notice requirements of Michigan Statutes?

b) Did the United States Court of Appeals reach a correct finding of fact in ruling that the Plaintiff was a subcontractor?

c) Should the United States Court of Appeals have made a determination as to the propriety of the Federal District Court ruling on Count II of Hub Electric Company, Inc.'s Complaint so as to give a complete determination as to all questions presented and resolve all conflicts between the parties?

4. The only statute pertinent to appeal is Michigan Statutes Annotated 5.2321(7):

"5.2321(7): SUIT ON BOND BY CLAIMANT; RIGHT OF ACTION; NOTICE, CONTENTS, SERVICE; PAYMENT TO SUBCONTRACTORS.) Sec. 7 A claimant who has furnished labor or material in the prosecution of the work provided for in such contract in respect of which payment bond is furnished under the provisions of section 3, and who has not been paid in full

therefor before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which claim is made, may sue on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of the civil action, prosecute such action to final judgment for the sum justly due him and have execution thereon. A claimant not having a direct contractual relationship with the principal contract shall not have a right of action upon the payment bond unless (a) he has within 30 days after furnishing the first of such material or performing the first of such labor, served on the principal contractor a written notice, which shall inform the principal of the nature of the materials being furnished or to be furnished, or labor being performed or to be performed and identifying the party contracting for such labor or materials and the site for the performance of such labor or the delivery of such materials, and (b) he has given written notice to the principal contractor and the governmental unit involved within 90 days from the date on which the claimant performed the last of the labor or furnished or supplied the last of the material for which the claim is made, ..."

5. A concise statement of the case is as follows:

COURSE OF PROCEEDINGS

Hub filed a five count amended Complaint in the United States District Court for the Eastern District of Michigan, Northern Division, on January 18, 1974. It alleged in Count I that it was a "claimant" under the Michigan Public Works Bonding Statute; that it was unpaid, and as such, was entitled to a Judgment against the Surety on the Payment Bond.

In Count II, Hub alleged that the Payment Bond, executed by Defendants Gust and Aetna, provided for the

protection of unpaid subcontractors and materialmen. Hub further alleged that it was an unpaid supplier and thus, the third party beneficiary of that contract for suretyship.

In Count III, Hub alleged that the School District, at the time of the commencement of the suit herein, held certain funds identified to its contract with Gust and that under the Builders Trust Fund Act (MCLA 570.151 *et seq.*), it held said funds as trustee for Hub, who was still unpaid.

Hub claimed against Bay in Count IV of its Complaint on a contract theory.

In Count I, Hub alleged an alternative theory that it was a subcontractor on the Grayling job.

Defendants Gust and Aetna filed answers alleging essentially that Hub was not a "claimant" under the Bonding Statute, and that even if Hub was a "claimant", it had failed to comply with the statutory requirements for perfecting its claim under the Bond. Defendants Gust and Aetna admitted execution of the Contract and Bonds referred to in Plaintiff's Complaint, but denied that Hub was a third party beneficiary under the terms of the Payment Bond.

Defendant School District admitted it was holding funds identified with the construction contract and admitted it had received notice of Hub's claim to those funds. School District neither admitted nor denied the remaining allegations of the Plaintiff's Complaint.

Defendant Bay filed no answer. Shortly after service of the Complaint and Summons upon Ernst Electric, a notice of bankruptcy and automatic stay was forwarded to Hub's attorney, indicating Ernst Electric Company and Charles Ernst had filed for bankruptcy in the Federal District Court for the Western District of Michigan.

On April 1, 1975, Hub filed a Motion for Summary Judgment as to Counts I, II and V in the First Amended

Complaint. Affidavits of Clyde Bennington (the President of Bay), Art Keeler and William V. Berger, were filed in support of the Motion.

Defendants Gust and Aetna filed Cross Motions for Summary Judgment, with affidavits by Gary Gust, Frans Jungslager and John Schnell filed in support thereof.

On August 4, 1975, the Court issued an Opinion and Order, finding that there was no material issue of fact as to Counts I and V of the First Amended Complaint. Hub was granted Summary Judgment against Aetna on Count V of the Amended Complaint, the Court finding that Hub was an unpaid subcontractor on the project and that it had complied in all respects with the statutory provisions for perfecting its claim on the Payment Bond.

The Court further found, that under the theory put forth by Hub in Count I of its Amended Complaint, Hub had failed to give the first notice required by the Bonding Statute, and could not recover against Defendant Aetna.

On August 19, 1976, the Court issued an Opinion and Order granting Hub's Motion for Summary Judgment on Count II of its Amended Complaint (the third party beneficiary theory) as against Defendants Gust and Aetna. It further granted Defendants Gust, Aetna and School District's Motion for Summary Judgment on Count III, (the Builders Trust Fund theory). All Motions for attorney fees and costs were denied.

The Opinion and Order were docketed on August 24, 1976, and a Clerk's Judgment was entered the same day.

Defendants Gust, Aetna and Crawford-AuSable School District filed timely notice of appeal, and Hub filed notice of cross-appeal within fourteen (14) days thereof.

STATEMENT OF FACTS

The only facts pertinent on appeal revolve around Plaintiff's relationship to the General Contractor Gust. Those facts are as follows:

a) The electrical equipment involved was ordered by Ernst (a subcontractor of Gust) from the Bay Electric Wholesale Co., Inc., who in turn ordered from Hub.

b) The equipment was not ordered by Gust, nor did any contract exist between Gust and Hub.

c) The architect's plans and specifications allowed use of Hub equipment, but also allowed use of any equipment of similar standards.

d) Hub failed to give notice of a claim 30 days after furnishing material as required by MSA 4.2321 (7) if a claimant failed to have a direct contractual relationship with the principal contractor.

Additional amplification of facts is offered by the appended Memorandum Opinion and Order of the United States District Court and Order of the United States District Court dated August 19, 1976.

7. The following is a direct and concise argument amplifying the reasons relied on for allowance of the Writ:

DID THE FEDERAL DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS REACH A CORRECT FINDING IN RULING THAT THE PLAINTIFF WAS A SUBCONTRACTOR?

Defendants-Appellants answer "NO".

Defendants have maintained throughout that the Plaintiff Hub's relationship to the Defendant Gust is that of a materialman (Hub) to a General Contractor (Gust). Defendant maintains that a claimant in this relationship cannot recover from the General Contractor or under the bond.

The most recent case in support of this position is *J. W. Bateson Company, Inc.* v *United States ex. rel. Board of Trustees of the National Automatic Sprinkler Industry Pension Fund*, 98 S. Ct. 873 (1978). The issue was whether a contract must exist between a claimant and a contractor. This Court at Page 876 states:

> ". . . a subcontractor who *performs for and takes from the prime contractor* a specific part of the labor or material requirements of the original contract . . . Id., at 109, 64 S. Ct., at 894 (emphasis added).
>
> It thus appears that a contract with a prime contractor is a prerequisite to being a "subcontractor." "

Bateson continues at Page 877 and 878 to reinforce the position and reaffirm the leading case in this area, *McEvoy* v *United States ex. rel. Calvin Tompkins Company*, 322 US 107.

It should be noted that on this issue, the United States Court of Appeals rejected the Federal District Court's findings as to the subcontractor status of the Plaintiff and upheld its findings in Count V for "somewhat different reasons." In fact, the United States Court of Appeals, in its decision, admits Defendant's argument that Hub "is not under the facts here a claimant having a direct contractual relationship with Gust, the principal contractor within the meaning of Section 7 of the 1963 Act."

Thus, Defendants submit that the Court of Appeals and the Federal District Court have rendered a decision in conflict with themselves and in conflict with prior decisions of this Court and Certiorari must be granted.

DID THE UNITED STATES COURT OF APPEALS ERR IN REVERSING THE DECISION OF THE FEDERAL DISTRICT COURT IN FINDING THAT THE BOND CLAIMANT MUST COMPLY WITH THE TERMS OF THE BOND, AND NEED NOT COMPLY WITH THE NOTICE REQUIREMENTS OF MICHIGAN STATUTES?

Defendants-Appellants answer "YES".

The parties and the Court are in agreement that Plaintiff failed to give notice to Gust 30 days after delivery of equipment as would be required by MSA 5.2321 (7) supra, if Hub had no direct contractual relationship with Gust, the principal contractor.

The United States Court of Appeal's Opinion differs from the trial court's in that the Court of Appeals states that the 30-day Michigan Notice Statute need not be complied with by a claimant on a Payment Bond. This construction circumvents the notice requirements of the Michigan Statutes, and substitutes the Court of Appeals' Opinion that the Michigan Legislature "saw no benefit to the continuation of the distinction between materialmen and subcontractors when it came to affording the statutory protection of the Payment Bond."

Defendants make the observation that many Bonds written on Governmental projects contain similar language, and, thus, there exists a significant reason to fully construe rights and liabilities of participants on Government projects.

Defendants submit that the United States Court of Appeals cannot construe legislative intent to contradict existing statutes. Defendants submit that the Court of Appeals has decided an important state question in a way that conflicts with state law. Thus, Certiorari must be granted.

SHOULD THE UNITED STATES COURT OF APPEALS HAVE MADE A DETERMINATION AS TO THE PROPRIETY OF THE FEDERAL DISTRICT COURT'S RULING ON COUNT II OF HUB'S COMPLAINT SO AS TO GIVE A COMPLETE DETERMINATION AS TO ALL THE QUESTIONS PRESENTED AND RESOLVE ALL CONFLICTS BETWEEN THE PARTIES?

Defendants-Appellants answer "YES".

The United States Court of Appeals, in its Opinion, states that "in view of our decision to affirm the judgment on other grounds, we decline to address the propriety of the District Court's ruling on Count II.

The trial court awarded Judgment to Plaintiff on Count II, a third party beneficiary theory. Defendants-Appellants appealed the trial court's ruling. Defendants-Appellants argument to Count II was fully briefed, and argued. The Court of Appeals, however, failed to decide the question.

The Court's failure to decide places a burden on the Defendants-Appellants. The Defendants-Appellants, Gust and Aetna, have, for the purpose of litigation to date, been thought of synonymously. There are, however, substantial differences between the parties which must be resolved when all litigation is complete. These issues cannot be resolved until complete determinations are made. At such time, Gust and Aetna can then assess their positions vis-a-vis each other.

Defendants-Appellants request that the Court allow Certiorari to resolve Count II as requested of the Court of Appeals, or, in the alternative, remand for determination.

CONCLUSION

Defendants-Appellants submit their Writ of Certiorari should be granted for the reasons as outlined above:

1) A substantial and important conflict exists between the decisions of the United States Court of Appeals in this case and decisions of the United States Supreme Court.

2) The Court of Appeals has decided a state question in a way that conflicts with state law.

3) To resolve all differences between the parties.

DATED: January 4, 1979

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN NORTHERN DIVISION

HUB ELECTRIC COMPANY, INC., an Illinois corporation,
Plaintiff,

v

AETNA CASAULTY AND SURETY COMPANY, a Connecticut corporation; GUST CONSTRUCTION COMPANY, INC., a Michigan corporation; BAY CITY ELECTRIC WHOLESALE COMPANY, INC., a Michigan corporation; CRAWFORD-AUSABLE SCHOOL DISTRICT, a Michigan School District and ERNST ELECTRIC COMPANY, INC., a Michigan corporation,
Defendants.

CIVIL ACTION
No. 74-10048

ORDER

At a session of said Court, held in the Federal Building, Flint, Michigan, on August 4, 1975

Present: HONORABLE JAMES HARVEY
United States District Judge

IT IS HEREBY ORDERED that the Motion for Summary Judgment filed in the above entitled cause by

defendant Gust Construction Company, Inc. and defendant Aetna Casuaity and Surety Company be and hereby is DENIED and the plaintiff's Motion for Summary Judgment be and hereby is GRANTED as to Count V only, and DENIED as to Counts I and II for the reasons set forth in a Memorandum Opinion of the Court entered on this date.

(s) James Harvey
United States District Judge

A TRUE COPY

HENRY R. HANSSEN, *Clerk*

By (s) Pauletta Hembling
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN NORTHERN DIVISION

HUB ELECTRIC COMPANY, INC., an Illinois corporation,

Plaintiff,

v

AETNA CASAULTY AND SURETY COMPANY, a Connecticut corporation; GUST CONSTRUCTION COMPANY, INC., a Michigan corporation; BAY CITY ELECTRIC WHOLESALE COMPANY, INC., a Michigan corporation; CRAWFORD-AUSABLE SCHOOL DISTRICT, a Michigan School District and ERNST ELECTRIC COMPANY, INC., a Michigan corporation,

Defendants.

CIVIL ACTION
No. 74-10048

MEMORANDUM OPINION

These are motions for summary judgment, one having been filed by plaintiff, Hub Electric Company, Inc. (Hub), and the other by defendants Aetna Casualty and Surety Company (Aetna) and Gust Construction Company, Inc. (Gust). In 1972, Gust contracted with defendant Crawford-Ausable School District to construct a high school in Grayling, Michigan. Pursaunt to the express terms of the

contract, and as required by 1963 PA 213 (MCLA 129.201 et seq), the Michigan Public Works Bonding Statute, Gust executed a labor and materials bond. Aetna is the surety on that bond. As work progressed, plaintiff provided electrical fixtures and supplies valued at $28,702.40, which were actually used in the construction. It seems to be agreed that plaintiff has been paid only $8,003.60, and this suit is an attempt to recover the balance.

Three of the five counts of the Complaint are directed at Aetna, and represent attempts by plaintiff to recover on the bond. The issues raised in these motions go directly to plaintiff's ability to do so, either as a materialman (as alleged in Counts I and II), or as a subcontractor (as alleged in Count V). The Court must determine whether plaintiff is a "claimant" as recognized by Section 6 of the Bonding Statute (MCLA 129.206), and if so, whether plaintiff gave the proper statutory notice to defendant as is required by Section 7 (MCLA 129.207), for it to recover as a materialman.

A "claimant" is defined in Section 6 of the Bonding Statute as:

> ". . . a person having furnished labor, material, or both, used or reasonably required for use in the performance of the contract. 'Labor and material' includes that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment directly applicable to the contract."

Two classes of "claimants," laborers and materialmen, may seek the protection of the bond under Section 6. It is undisputed that plaintiff is a materialman, and the plain language of the statute would thus seem to settle the issue without further consideration. But as noted in a prior opinion of this Court, the Michigan Supreme Court has chosen to distinguish some materialmen from others. Defendant's claim is that plaintiff falls within the class of materialmen who are excluded from the Statute's protection, i.e., that

plaintiff is a materialman to a materialman. See *People* v *Wayne Electric Motor Company*, 269 Mich 537 (1934).

Before determining plaintiff's status as a claimant, however, the requirements of Section 7 of the Statute must be examined, for if plaintiff failed to provide defendant with the notice required therein, then under no circumstances can it recover as a materialman. Section 7 requires a "claimant not having a direct contractual relationship with the principal contractor" to serve notice on the latter within thirty days of first supplying materials informing him of the nature of such materials being or to be supplied and to, in addition, give written notice to the principal contractor and the governmental unit involved within ninety days of the date upon which materials were last supplied, stating the amount claimed and the name of the party to whom the material was supplied.

Plaintiff's complaint, Count I, Paragraph 9 states that plaintiff first furnished material on March 9, 1972, and last furnished material on December 10, 1973. To comply with the statute, the first required notice should have been sent by April 8, 1972. No notice as actually sent until October 18, 1973. That notice purported to be sent pursuant to the provisions of the bond and the laws of Michigan. It noted that certain materials had not yet been shipped. A second notice dated December 20, 1973, followed when the shipment had been completed. Thus, the notice requirements which plaintiff provided complied with the ninety day requirement of Section 7, but no thirty-day notice was given.

A copy of the bond is attached to the Complaint. Its only requirement regarding the giving of notice is that a claimant who has not been paid so notify the contractor and surety within ninety days of the last delivery. Plaintiff has thus complied with all the requirements of the bond. The only question is whether plaintiff's claim is defeated by its failure to comply with the initial thirty-day requirement of the statute. Plaintiff argues that the thirty-day requirement is not important, and that defendants can show no prejudice or

injury by failure of plaintiff to provide such notice. Therefore, plaintiff concludes that its failure should be excused.

Plaintiff correctly notes that all of the cases which have dealt with the notice requirements of the Public Works Bonding Statute have always referred to the final notice requirement. This is true, but only because the prior act, 1905 PA 187 (MSA 26.321 et seq) contained but a single notice requirement, that being within sixty days after furnishing the last material. All the cases which have discussed the notice requirements have dealt with the prior act. While 1963 PA 213 has been in force for over a decade, its new thirty-day initial notice requirement has never been construed by the Appellate Courts in Michigan. No implication can be derived from this which would indicate that the requirement is not necessary or important to establishing a claim under the present statute.

Plaintiff has argued that the Michigan Courts have held that the failure of a claimant to comply with the notice requirement under the prior statute have not barred the claim unless the defendants can show prejudice or injury. The cases which plaintiff cites in support have no applicability to the present case. *New Jersey Terre Cotta Co* v *Traves*, 188 Mich 415 (1915), and *People* v *Connell*, 195 Mich 77 (1917), predate amendments to the Statute in 1925 and 1927 which apparently evidenced a concern for the protection of the surety. In *People* v *Michigan Surety Co*, 360 Mich 546 (1960), the history of the statute is briefly discussed, the point being that the old rule regarding lack of prejudice to the surety lost its validity with the holding in *People* v *W L Thon Co*, 307 Mich 273 (1943). The most recent case to discuss the mandatory nature of the notice requirement is *People* v *Cooke Contracting Co*, 372 Mich 563 (1964). It is certain that the predecessor of the present public works bonding statute required strict adherence to the notice requirement for a claimant to seek to recover on the bond. The purpose of that rule was to protect the surety from becoming the "virtual

insurer of all debts" and from having to "supervise the activities of contractors and subcontractors far beyond what is necessary under the statute." *Id* p 566. There is no reason to believe that the present statute does not serve the same goals or that strict compliance with its notice requirements is not mandatory.

As has been noted, the bond in question here omitted any reference to the initial thirty-day requirement. Plaintiff implies that it should be allowed recovery on the bond in view of the fact that it met the requirements therein, even through it failed to meet the statutory requirements. This brings up the question of whether a statutory requirement can be waived. It appears that it cannot. The general rule is stated in *Williamson* v *Williams*, 262 Mich 401, 404 (1933): "Where a bond is given under the authority of a statute, that which is not expressed but should have been incorporated, is included in the bond." The provisions of the statute are read into the bond and are given full effect. "When parties execute a statutory bond, they are chargeable with notice of all provisions of the statute relating to their obligation. . ." *Id* p 406. Of course, plaintiff or any other claimant, is not a party to the bond. It may be argued that while the parties may not connive to deprive claimants of statutory rights, they may, if they wish waive statutory requirements which are designed for their own protection. While there may be some merit to this, the argument is foreclosed by this language from *People* v *W L Thon Co, supra*, p 278:

> "The statute requires notice by materialmen within sixty days of the date of the furnishing of the last of materials. This requirement could not be the subject of waiver by acts of the contractor and plaintiff (materialman)."

The conclusion is that plaintiff has not met the statutory notice requirements by virtue of its failure to notify defendants within thirty days of first delivery of the nature of the materials being furnished or to be furnished. Thus, the Court need not express an opinion as to whether plaintiff is a

"claimant" under the statute in its role as a materialman. However, plaintiff also claims to be a subcontractor for purposes of recovery on the bond, and as such, would not be subject to the notice requirement of the statute.

The question of plaintiff's status as a subcontractor is heavily dependent upon its precise relationship to the contractor. Affidavits have been submitted by both sides which attempt to establish this relationship. Preliminarily, the Court notes that plaintiff objects to defendant's three affidavits on the basis that they fail to state facts and are affidavits of opinion and legal conclusion, and as such, not admissible as evidence per Rule 56 F R Civ P. This Court has examined the two affidavits which are appropriate in considering this point, those of Frans Jungslager and John Schnell, and believes that portions beyond a doubt represent opinions. However, both affiants were architects for the high school project and as such, are competent to testify as to the plans and specifications which they prepared.

On December 6, 1971, Vander Meiden, Koteles & Associates, Inc., the architects, sent plans and specifications for the school job to Art Keeler, plaintiff's agent, in Royal Oak, Michigan. Keeler prepared a quotation in accordance with the plans and specifications and mailed same to the electrical contractor on December 13, 1971. (See Keeler affidavit and attached Exhibits A and B). On March 9, 1972, Bay Electric Wholesale Co., Inc. placed a purchase order for electrical equipment and supplies with plaintiff. Bay Electric considered itself to be the jobber on the school project. (See Bennington affidavit and attached Exhibit A). The purchase order, #E-5683 is referred to in a letter from Ernst Electric Co., dated March 3, 1972 to Art Keeler, in which it is stated that payment on the order would be made by check payable jointly to Bay Electric and plaintiff. The letter also states that Mr. Bennington of Bay Electric would advise Ernst as to the correct amount for which the check should be drawn. (See Exhibit 3 attached to plaintiff's motion). On April 12, 1972, plaintiff submitted drawings from the plans and

specifications which had been sent to Art Keeler. Those drawings embodied plaintiff's interpretations of the plans and specifications as they applied to the electrical equipment which was to be furnished. The architects approved the drawings on May 31, 1972. (See Burger affidavit and attached Exhibit A). Plaintiff proceeded to manufacture certain equipment and modify other of its stock equipment, especially for use on the school job. All of the equipment was sent directly to the job sit in Grayling by plaintiff.

Frans Jungslager, one of the architects, drafted the electrical portions of the school project specifications. His affidavit includes portions of those specifications. The stage lighting system is to be "similar to Hub Electric Company #CRB 2445-H system," but other equipment is also stated to be acceptable (Exhibit A attached to affidavit). However, other portions of the specifications designate only Hub products. (Exhibit C attached to affidavit: Panic Stations shall be Hub #9991 series. . .") The affidavit says this is done because it would be very time-consuming to determine the name and model number for each of the acceptable suppliers, and that the general specifications put the suppliers on notice that other suppliers will be acceptable. Mr. Jungslager concludes that he, as architact, would not approve plaintiff as a subcontractor, for it is his policy to have only one of such in order to more easily identify who is responsible for mistakes.

John Schnell, another of the architects on the school project, drafted and prepared the architectural trades and contract sections of the specifications. He states in his affidavit that it is his policy to allow competition for all supplies, especially in governmental jobs. The Product Approval Standards (Exhibit A attached to affidavit) substantiate this view. It is also noted that Section 2.0(e) says: "Whenever any product is specified, or shown by describing proprietary items, model numbers, catalog numbers, manufacturer-trade names or similar reference, the bidder obligates himself to submit proposals and accept

awards of contracts based upon the use of such products. Use of such reference is intended to establish the measure of quality which the architect has determined as requisite and necessary for the project."

The two architects' affidavits establish that the competition was open to all suppliers regardless of whether one was specified by name to the apparent conclusion of others. In such instances, it is clear that the purpose of the architect was to set up a particular product as a standard by which competing products were to be judged and that products of other manufacturers had to be equal to that specified to be approved.

While the architects state that in their view, plaintiff was a supplier or materialman, the case law ultimately must judge what plaintiff's status was. The test in Michigan is set forth in *People* v *Valley Mantle & Tile Co*, 200 Mich 554 (1918): "The subcontractor, is an under-contractor — one who takes under the original contract, and is to *perform in accordance with the original contract.*" (emphasis in original) Further, a subcontractor is one who contracted to become such after contemplation of the original contract and agreeing that it would be the standard for his performance. Unless this requirement is complied with, the mere furnishing of material which meets the contract specifications does not make one a subcontractor. Nor does the fact that the plans and specifications were analyzed by itself indicate that one is a subcontractor unless it appears that there was present an agreement to perform in accordance with the terms of the original contract; that it would provide the standard by which one's performance would be judged. See also *People* v *Finn*, 162 Mich 481 (1910); *People* v *Title Guaranty & Trust Co*, 154 Mich 614 (1908); *People* v *National Construction Co*, 159 Mich 133 (1909); *People* v *Cotteral*, 119 Mich 27 (1898); *People* v *Connell*, 195 Mich 77 (1917); *People* v *Campfield*, 150 Mich 675 (1908).

In *People* v *Connell, supra*, the plaintiff Connell entered into a contract with a board of education to construct a

school in Detroit under architectural plans and specifications. Connell contracted with plaintiff to furnish certain interior finish. Plaintiff did "manufacture the interior finish in conformity with the plans and specifications of the architects." *Id* p 79. It was concluded that plaintiff was a subcontractor because the original contract provided the standard by which its performance was judged.

In *People* v *Finn, supra*, defendant Finn contracted to build a fire house according to architects plans and specifications. Moynes subcontracted to furnish carpentry work, builder's hardware, and to line some bins and stalls. The plaintiff contracted with Moynes by letter to furnish the hardware trimmings as per plans and specifications. Moynes, the subcontractor, went bankrupt and it was necessary for Finn to complete his contract at a loss. Plaintiff then brought suit on Finn's bond. It was determined that plaintiff was a subcontractor, the court accenting these facts: Plaintiff had quoted a price to Moynes for the hardware "as per plans and specifications;" plaintiff

> "went all over the plans and specifications prepared by (the architects) for this job, and from them ascertained what work would be required, and agreed to do the work according to such plans and specifications. These plans and specifications were a part of the original contract, which required the contractor to furnish material and articles in conformity therewith, under the direction and to the satisfaction of the architects." (162 Mich at p 484);

that plaintiff provided the hardware from its shelf stock was irrelevant since it was provided with the plans and specifications of the original contract, as the standard by which its quality or satisfactoriness would be judged. *People* v *Finn, supra* is very difficult to distinguish from the present case.

People v *Campfield*, supra, provides a factual situation which may be compared and contrasted to that here. Once

again, the defendant had contracted to build a school. The contract included specifications which called for stiffeners for the window sashes. They were to be "Davis or other equal steel stiffeners." Defendant contacted Davis, who agreed to furnish the stiffeners according to measurements provided by a subcontractor to defendant. The original contract did not specify the dimensions needed for each stiffener. It was held that the plaintiff, Davis, had not agreed to perform in accordance with the original contract; that in fact, the plaintiff could have complied with the contract which bound him to the subcontractor while at the same time providing material which did not conform to the contract between the principal contractor and the board of education. Thus, plaintiff was found to be a materialman.

Defendants rely heavily on *People* v *Valley Mantel & Tile Co, supra,* a case which was able to distinguish the *Finn* decision, and from it conclude that the plaintiff, like those in *Valley Mantel & Tile,* was not a subcontractor. The case involved a school contract with defendant as principal contractor. The building was to be erected in accordance with plans and specifications prepared by an architect. The plaintiffs had furnished certain materials used in the construction, presumably, directly to the defendant. Some of the plaintiffs had before them the plans and specifications at the time their bids were made and, reading the opinion liberally, it would appear that the materials thus provided met the requirements of the plans and specifications. The facts are somewhat obscure in *Valley Mantel* — — —

Furthermore, another fact which appeared to be important to the Court was that the architect testified that there were no subcontractors, and the original contract provided that the contractor could make no subcontracts without the architect's approval.

Testimony of a similar nature has been provided by the Jungslager and Schnell affidavits in the present case. It should be noted, however, that neither asserts that they had the authority per the original contract to approve subcontractors. The Court cannot find a clause in the original contract similar to that discussed in the *Valley Mantel & Tile* case. It may well be that there is. At any rate, the architects had the final approval on all aspects of the job, including the satisfactory quality of the materials, and this is an equivalent authority. In this case, the architects approved the materials provided by plaintiff, and thereby gave plaintiff a status which the law is left to determine.

It is not important what the architects thought plaintiff's status was. In fact, it is not important what plaintiff thought itself to be. The sole question before this Court is not what plaintiff was called, or what its position is in the heirachy of contractors, subcontractors, and suppliers might have been, but rather what plaintiff's legal status was for the purposes of the Public Works Bonding Statute. What this Court can gather from the many cases cited above, is that the focus must be on plaintiff's relationship with the principal contract in order to determine its status. If the requisite relationship is present then *for the purposes of the statute,* the plaintiff is a subcontractor, and may look to the bond for payment. Under those circumstances, the defendants may not complain that they regarded plaintiff as a supplier. As an aside, the Court is certain that plaintiff was happy to call itself anything defendant liked as long as it made the sale, and as long as the statute regarded one in its position as entitled to protection.

In the present case, plaintiff's agent was contacted by Frans Jungslager, one of the architects, even before the

principal contract was signed. The agent was requested to comment on the plans and specifications which listed many Hub products by name and number. The significance of this is not that it designated Hub as the sole supplier, but that it provided a mandatory standard of excellence which Hub or any other manufacturer would have to measure up to in order to properly perform. Specific requirements were established by the architects which apparently could not be varied by the subcontractor or contractor independently. It has not been shown that the subcontractor could establish separate standards for electrical fixtures between itself and plaintiff.

A quotation was submitted by plaintiff and eventually accepted after approval only the the architects. There is no question that the principal contract, and the plans and specifications of the architects, provided the standard by which plaintiff's performance was to be gauged. Plaintiff not only reviewed those plans and specifications in preparing its submittals, but was placed by defendants in the position of having to fulfill the requirements of the principal contract in order to have performed satisfactorily.

The exact contractual relationship between plaintiff and Ernst, the electrical subcontractor, or Bay Electric, the jobber, has not been established. The payment from Ernst to Bay City Electric and plaintiff jointly would indicate the superfluous role played by Bay Electric in the scheme of things. It may well be that plaintiff's relationship to Ernst was that of a direct supplier — Ernst handling the electrical construction at the job site, with several suppliers (See Exhibit C, Schnell affidavit) providing the fixtures and supplies. In this view, plaintiff and the other suppliers are quite easily seen as subcontractors in the practical sense, as well as the legal sense.

It is this Court's view that under Michigan law plaintiff must be considered a subcontractor. As such, plaintiff has complied with all the requirements necessary for it to recover on the bond executed by defendant Gust pursuant to

1963 PA 213. Plaintiff is therefore entitled to summary judgment on Count V of its Complaint.

(s) James Harvey
United States District Judge

Dated: August 4, 1975

A TRUE COPY

Henry R. Hanssen, *Clerk*

By: (s) Pauletta Hembling
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN NORTHERN DIVISION

HUB ELECTRIC COMPANY, INC., an Illinois corporation,
Plaintiff,

v

AETNA CASUALTY AND SURETY COMPANY, a Connecticut corporation; GUST CONSTRUCTION COMPANY, INC., a Michigan corporation; BAY ELECTRIC WHOLESALE COMPANY, INC., a Michigan corporation; CRAWFORD-AUSABLE SCHOOL DISTRICT, a Michigan School District; and ERNST ELECTRIC COMPANY, INC., a Michigan corporation,
Defendants.

v

BAY ELECTRIC WHOLESALE COMPANY, INC., a Michigan corporation; and GUST CONSTRUCTION COMPANY, INC., and AETNA CASUALTY AND SURETY COMPANY,
Cross-Defendants.

CIVIL ACTION
No: 74-10048

MEMORANDUM OPINION AND ORDER

At a session of said court, held in the Federal Building, Bay City, Michigan on August 19th, 1976

PRESENT: HONORABLE
JAMES HARVEY
United States District Judge

Pursuant to a Stipulation filed by the parties on or about July 29, 1976, the court will decide the remaining issues of law in this case upon renewed cross motions for summary judgment.

There are no material facts in dispute and the matter may therefore be properly disposed of on cross motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedures.

A stipulation of uncontested facts was made part of a final pretrial order filed with the Court on July 29, 1976 and said facts are as follows:

1. That on February 11, 1972, defendant Crawford-AuSable School District and defendant Gust Construction Company, entered into a contract for the construction of the new Grayling High School.

2. That on the same day mentioned above, defendants Gust Construction Company and Aetna Casualty and Surety Company executed a performance bond and a payment bond, each in the amount of Two Million One Hundred Twenty-six Thousand Three Hundred Five and no/100 Dollars ($2,126,305.00) in conjunction with the construction contract executed between Gust Construction Company, Inc., and the Crawford-AuSable School District, and that said payment bond providing "that, if Principal shall promptly make payment to all claimants as hereinafter defined, for all

labor and materials used or reasonably required for use in the performance of the Contract, then this obligation shall be void; otherwise it shall remain in full force and effect . . ."

3. On December 6, 1971, owners, Crawford-AuSable School District, through its architects, sent plans and specifications for the stage lighting and dimmer switch equipment (which stage lighting and dimmer switch equipment was subsequently sold by Hub Electric Company for the Grayling High School Job) to Art Keeler, plaintiff's agent, in Royal Oak, Michigan.

4. On December 13, 1971, Art Keeler, plaintiff's agent, prepared a quotation in accordance with the plans and specifications submitted to him by the owner, and mailed the same to the electrical contractor, defendant Ernst Electric Company.

5. On February 17, 1972, defendant Ernst Electric placed a purchase order with defendant Bay Electric Wholesale Company, Inc., for stage lighting and dimmer switch equipment to be used in the new Grayling High School, owned by defendant Crawford-AuSable School District. Said equipment was ordered "per plans and specifications" and final purchase was "subject to architectural approval," as appears from the terms of said purchase order.

6. On February 21, 1972, defendant, Gust Construction Company, the contractor herein, supplied the architects on the job with a supplier's list which named Hub Electric Company, the plaintiff herein, as an approved supplier on the job.

7. On March 3, 1972, defendant Ernst Electric Company, the electrical contractor, agreed that payment for the supplies and equipment purchased from plaintiff through Bay Electric Wholesale Company would be made jointly to plaintiff Hub Electric Company, and defendant Bay Electric Wholesale Company.

8. On March 9, 1972, defendant Bay Electric Wholesale Company, placed a purchase order for stage lighting and dimmer switch equipment with the plaintiff, Hub Electric Company, Inc., for the Grayling High School job under the same terms as those set out in Ernst Electric's purchase order.

9. On April 12, 1972, plaintiff Hub Electric submitted drawings to the owner, defendant Crawford-AuSable School District, which embodied plaintiff's interpretations of the requirements for stage lighting and dimmer switch equipment as required by the owner's plans and specifications.

10. The owner's architect on the job approved plaintiff's drawings on May 31, 1972.

11. Plaintiff specially manufactured certain of the equipment necessary for the job, pursuant to the plans and specifications of the owner, and modified other of its stock equipment to meet the requirements of the owner's plans and specifications and that all of said stage lighting equipment and dimmer switch equipment met owner's requirements, as set out in the plans and specifications.

12. Commencing on or about June 20, 1972, plaintiff Hub Electric, pursuant to the purchase order earlier placed with it, began shipping supplies and equipment directly to the job site in Grayling, Michigan.

13. Between June 20, 1972 and December 10, 1973, plaintiff shipped equipment and supplies called for under the purchase order of March 9, 1972, directly to the job site for which it was paid Eight Thousand Three and 60/100 Dollars ($8,003.60) on account.

14. There remains due and owing to plaintiff, the unpaid balance of Twenty-Two Thousand Two Hundred Twenty-Five Dollars ($22,225.00).

15. On October 18, 1973 and December 20, 1973, plaintiff sent by certified mail, return receipt requested, to all of the

defendants herein, its Notice of Claim on the payment bond herein, under MCLA 129.201 et seq.

16. Defendant Crawford-AuSable School District, the owner at the time of the commencement of this suit, was holding Twelve Thousand One Hundred Seventy-Five and no/100 Dollars ($12,175.00) due to Gust Construction Company, Inc., the contractor, for the construction of the new Grayling High School.

17. Defendant Ernst Electric has filed a voluntary petition in bankruptcy in the Federal District Court for the Western District of Michigan.

18. Defendant Bay Electric Wholesale Company, Inc., has worked an out-of-court composition with its creditors and is now operating under the terms of that composition.

19. On or about January 17, 1974 plaintiff Hub Electric Company, Inc., filed suit in the United States District Court for the Eastern District of Michigan, claiming breach of contract; asserting its rights under the payment bond; and that the funds being held by the defendant Crawford-AuSable School District are Trust Funds being held for plaintiff's benefit.

20. That defendant Crawford-AuSable School District did, on or about November 28, 1975, transfer the funds being held by it under the contract to defendants Aetna and Gust, who now hold said funds.

Based on the above facts the plaintiff asserts various legal theories to support its claims. The following are plaintiff's claims set forth in the alternative in Counts Two and Three of the second amended complaint and the stipulated pretrial order:

1. The plaintiff claims against defendant Aetna Casualty and Surety Company and Gust Construction Company upon the terms of a payment bond, executed by defendants Aetna and Gust Construction Company, Inc. Plaintiff claims that it

supplied stage lighting equipment for the construction of the Grayling High School and is unpaid in the amount of Twenty-Two Thousand Two Hundred Twenty-Five Dollars ($22,250.00). Plaintiff asserts that it is a "claimant" under the provisions of MSA 5.2321(1) et seq, the Michigan Public Works Bonding Statute.

2. Hub also claims, in Count II, that it was the third-party beneficiary of the contract (bond) for suretyship executed between Aetna and Gust Construction Company, Inc., and a third-party beneficiary of the contract executed by Gust and the defendant Crawford-AuSable School District, on February 11, 1972, and that Twenty Two Thousand Two Hundred Twenty-Five Dollars ($22,225.00) is owing to it based upon common law third-party beneficiary theory and under MCLA 600.1405.

3. Plaintiff further claims against defendants Crawford-AuSable School District, Aetna Casualty and Surety Company and Gust Construction Company, on the basis that defendants are trustees of funds being held by them, for the benefit of plaintiff, an unpaid supplier, under MCLA 570.151 et seq.

4. Plaintiff further claims against defendant Bay Electric Wholesale on the theory that plaintiff and defendant Bay Electric had a contract of purchase for the stage lighting equipment, and that plaintiff has completed performance and is unpaid.

5. Plaintiff also claims under the Public Works Bonding Statute, MSA 5.2321, that plaintiff was a subcontractor on the Grayling High School Job and is entitled to a judgment on the payment bond executed by defendants Aetna and Gust.

Defendants Gust and Aetna assert as a defense to plaintiff's claims set out above the following:

1. That plaintiff has failed to comply with the procedures for perfecting its claim on the bond under MSA 5.2321

in that plaintiff failed to give notice of its claim within thirty (30) days of the time plaintiff commenced work.

2. That plaintiff is not a "claimant" under the terms of the Michigan Public Works Bonding Statute.

3. Defendant School District admits that it is holding funds due defendant Gust for the Grayling High School project, but neither admits nor denies the other essential allegations of plaintiff's Complaint, except it does admit receiving plaintiff's notice of its claim to the fund.

Furthermore, defendants Gust Construction Company, Inc., and Aetna Casualty and Surety Company cross-claim against defendant Bay Electric Wholesale Company for indemnity on plaintiff's claim against defendants Gust and Aetna. Cross-defendant Bay Electric denies that cross-claimants have any right to indemnity and have filed a motion for summary judgment.

Previously, the Court has entered various opinions and orders granting in part and denying in part prior cross-motions for summary judgment and ratifying stipulations between the parties. Some issues of law which were resolved in those prior opinions and orders will be relevant in the Court's decisions on the remaining issues above mentioned. Prior orders of this court are summarized as follows:

A. By this Court's opinion dated August 4, 1975, it has indicated that plaintiff failed to meet the notice requirements for claiming on the bond as required by MSA 5.2321 and therefore plaintiff cannot recover on Count I of its Complaint.

B. By Order dated August 4, 1975, this Court has granted plaintiff a summary judgment on Count V finding that plaintiff was a subcontractor on the Grayling High School Job and that it has complied in all respects with the requirements of MSA 5.2321.

C. Defendant Bay Electric has stipulated to entry of Judgment on Count IV of plaintiff's Complaint.

D. By this Court's Order dated November 20, 1975, defendants Aetna and Gust must indemnify defendant Crawford-AuSable School District for plaintiff's claim.

E. By Order of this Court dated February 4, 1976, the cross-claim of defendant School District against defendants Gust and Aetna was dismissed.

The issues now before the Court on cross motions for summary judgment on Counts Two and Three of plaintiff's complaint are:

1. Whether or not plaintiff is a third-party beneficiary of the contract executed between Gust and Aetna and Gust and Crawford-AuSable School District.

2. Whether or not defendants School District, Aetna and Gust, hold funds due under the contract, as trustee for plaintiff.

3. Whether or not defendants Gust and Aetna have a right to indemnity as against defendant Bay Electric.

I.

Having reviewed the cross motions for summary judgment and the legal memoranda in support thereof and in opposition thereto and being otherwise fully advised in the premises, the Court finds that plaintiff may recover on Count Two of its second Amended Complaint.

Plaintiff can be considered a third party beneficiary to the original construction contract between Crawford-AuSable School District and Gust Construction Company, executed on February 11, 1972. Provisions 4.41 and 5.4.1 of said construction contract clearly place the obligation upon the contractor to insure that subcontractors are paid for their work.

Under the Michigan statutory law, which has codified common law third-party actions, the rights of third-party

beneficiary becomes vested "at the moment the promise becomes legally binding on the promisor . . ." MCLA 600.1405(2). Given the uncontested facts in the case, it is clear that plaintiff's claim is vested. The "promisee", Crawford-AuSable School District has completed performance of its part of the contract by turning over as "owner" all monies held by it to the "contractor" and "promisor" Gust Construction Company.

It is clear by Articles IV and V of the principal contract and the terms of the payment bond that plaintiff as an unpaid supplier and/or subcontractor is within the class of persons sought to be protected by both the original contract and the terms of the payment bond. See *Hardware Dealers Mutual Ins Co* v *Hidey*, 349 Mich 490 (1957).

II.

The Court will grant defendants' motion for summary judgment on Count III of plaintiff's Second Amended Complaint for the law of the Sixth Circuit is clear that the provisions of MCLA 570.151 do not apply to public projects. *General Insurance Co of America* v *Lamar Corp*, 482 F2d 856 (CA 6, 1973).

Based on the above findings of the Court, judgment shall be entered on behalf of the plaintiff and against defendants Gust Construction Company and Aetna Casualty and Surety Company, jointly and severally, on Count II of plaintiff's Second Amended Complaint in the stipulated amount of Twenty Two Thousand Two Hundred and Twenty Five ($22,225.00) Dollars.

The parties have also filed cross motions for attorneys fees. Having reviewed said motions and being otherwise fully advised in the premises, the Court finds both motions to be without merit and will in its discretion deny the same.

III.

On August 4, 1976, the cross-defendant Bay Electric Wholesale Company, Inc. renewed its motion for summary judgment as against Aetna Casualty and Surety Company and Gust Construction Company, Inc. on their cross claims for indemnification.

Having reviewed the motion of the cross defendant and the memorandum in support thereof, there being no opposition thereto, and being otherwise fully advised in the premises, the Court finds said motion has merit. No basis for the indemnification claim of the cross plaintiff can be found in fact or in law, no expressed or implied agreement between these parties having been established nor legal duty having arisen during the course of events leading to this lawsuit. For these reasons, the motion for summary judgment will be granted.

Now, Then, IT IS HEREBY ORDERED that Plaintiff's Motion For Summary Judgment on Count II of the Second Amended Complaint is GRANTED and defendants' cross motion for summary judgment is DENIED; and

IT IS FURTHER ORDERED that Defendants' Motion For Summary Judgment on Count III of plaintiff's Second Amended Complaint is GRANTED and plaintiff's cross motion is DENIED; and

IT IS FURTHER ORDERED that the cross motions of the plaintiff and defendants as to attorneys fees are hereby DENIED; and

IT IS FURTHER ORDERED that the Summary Judgment motion of the cross defendant Bay Electric Wholesale Company, Inc. is hereby GRANTED and the cross-claim for indemnification of the cross-plaintiffs, Aetna Casualty and Surety Company and Gust Construction Company, Inc., is DISMISSED; and

IT IS FURTHER ORDERED that the defendants Aetna Casualty and Surety Company and Gust Construction Com-

pany, Inc., jointly and severally, are liable to the plaintiff HUB ELECTRIC COMPANY, INC. on Count II of the Second Amended Complaint in the amount of Twenty Two Thousand Two Hundred and Twenty-Five ($22,225.00) Dollars, plus interest and costs; and

IT IS FURTHER ORDERED, pursuant to the Court's Memorandum Opinion and Order dated August 4, 1975, Count I of the plaintiff's Second Amended Complaint is hereby DISMISSED; and

IT IS FURTHER ORDERED, pursuant to the Court's Memorandum Opinion dated August 4, 1975, the defendant Aetna Casualty and Surety is liable to plaintiff HUB ELECTRIC COMPANY, INC. on Count V of the Second Amended Complaint in the amount of Twenty Two Thousand Two Hundred and Twenty-Five ($22,225.00) Dollars, plus interest and costs.

IT IS SO ORDERED.

(s) James Harvey
United States District Judge

A TRUE COPY

HENRY R. HANSSEN, *Clerk*

By (s) Pauletta Hembling
Deputy Clerk

Nos. 76-2607-08

UNITED STATES
COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HUB ELECTRIC COMPANY, INC.,
Plaintiff-Appellee-Cross-Appellant,

v.

GUST CONSTRUCTION COMPANY, INC., AND AETNA CASUALTY AND SURETY COMPANY,
Defendants-Appellants-Cross-Appellees.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed October 13, 1978.

Before: WEICK, EDWARDS AND ENGEL, Circuit Judges.

ENGEL, Circuit Judge. This matter is before the court upon cross-appeals from a judgment of the district court awarding damages to Hub Electric Company in the amount of the unpaid balance due it for certain stage lighting equipment which Hub furnished in the construction of a public high school in Grayling, Michigan, for the Crawford-AuSable School District. The defendant Gust Construction Company was the prime contractor for the project. Pursuant to the 1963 Michigan Public Works Bonding Act, M.C.L.A. §129.201 *et seq.*, M.S.A. §5.2321(1)-(11), Gust contracted for a payment bond with appellant Aetna Casualty and Surety Company. The relevant details of the transaction are set forth in an opinion of the district court reported at 400 F. Supp. 77 (E.D. Mich. 1975) and in an unreported opinion filed in the district court on August 19, 1976.

In the reported opinion, the district court entered a summary judgment in favor of Hub on Count V of its second amended complaint, holding that Hub was a subcontractor on the Grayling High School job and that it was entitled to recover upon the bond, having complied in all respects with the requirements of the 1963 Act, *supra*. In the unreported opinion of August 19, 1976, the trial court further ruled that Hub was a third-party beneficiary of the contracts between Gust and Aetna and Gust and the Crawford-AuSable School District, as alleged in Count II of the complaint. Judgment on those counts was entered in a stipulated amount of $22,225. Those opinions also entered summary judgment in favor of the defendants on Counts I and III of Hub's complaint.[1]

While the issues appear to have been submitted to the court in the form of cross motions for summary judgment, it is apparent from the conduct of the parties, both in the district court and on appeal, that the case was, in substance, submitted to the trial court for a decision on the merits upon a stipulated record consisting of the several affidavits, counter affidavits and relevant exhibits pertaining to the numerous theories of recovery and of defense. In the interest of clarity, we believe it would have been the better practice for the trial court to have obtained a more precise stipulation from the parties for submission of all issues on the merits, thus avoiding any possibility that the loser would claim that there yet remained unresolved disputes of fact which made the summary judgment procedure inappropriate. Since no such claim, however, has ever been made in the district court or here, we, like the parties, proceed to treat the issues as having been tried to the court on the merits.

In his reported opinion, Judge James Harvey denied recovery under Count I of the complaint, which asserted plaintiff's rights as a materialman. Judge Harvey reasoned that because the plaintiff had failed to comply with the

[1] The district court also entered a stipulated judgment for Hub on Count IV, which sought recovery against Bay Electric Wholesale Company. No appeal was taken from the judgment.

30-day notice requirement of Section 7(a) of the 1963 Act, M.C.L.A. §129.207(a), M.S.A. §5.2321(7)(a),[2] its rights as a materialman were defeated. 400 F. Supp. at 78-80. On the other hand, he held that Hub was also a subcontractor under Michigan law, *id.* at 80-84, and that the 30-day notice requirement did not apply to subcontractors. *See id.* at 80, 84. He therefore concluded that Hub was entitled to recover upon the bond under Count V.

We agree with Judge Harvey that the 1963 Act applies to the contract here,[3] to the exclusion of the previously applicable 1905 Mich. Pub. Act No. 187, as amended, M.C.L.A. §570.101 *et seq.*, M.S.A. §26.321 *et seq.* The 1963 Act requires the execution of both performance and payment bonds, and at issue here is the payment bond provision of that statute.

As Judge Harvey noted, Hub filed a notice under Section 7 (b) within 90 days after it last supplied the lighting equipment, although it had failed to serve the subsection (a) notice within 30 days after it began furnishing the equipment.

[2] Section 7 of the 1963 Act provides in part:

> A claimant not having a direct contractual relationship with the principal contractor shall not have a right of action upon the payment bond unless (a) he has within 30 days after furnishing the first of such material or performing the first of such labor, served on the principal contractor a written notice, which shall inform the principal of the nature of the materials being furnished or to be furnished, or labor being performed or to be performed and identifying the party contracting for such labor or materials and the site for the performance of such labor or the delivery of such materials, and (b) he has given written notice to the principal contractor and the governmental unit involved within 90 days from the date on which the claimant performed the last of the labor or furnished or supplied the last of the material for which the claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed.

M.C.L.A. §129.207, M.S.A. §5.2321(7). *See* note 5 *infra*.

[3] The 1963 Act expressly limits the application of the 1905 Act to certain highway projects. M.C.L.A. §129.211, M.S.A. §5.2321(11).

400 F. Supp. at 79. The notice which Hub provided, however, complied with all the requirements of the bond, which omitted reference to the initial 30-day notice. *Id.*[4] Nevertheless, Judge Harvey held that the absence of such reference in the bond did not amount to a waiver of the statutory requirement, relying upon what he found to be the general rule as stated in *Williamson* v *Williams*, 262 Mich. 401, 404, 247 N.W. 704, 705 (1933). To the argument that the surety could, by contract, waive its statutory notice privilege, Judge Harvey concluded that while there may be some merit to the contention, that argument was foreclosed by *People* ex rel. *Wheeling Corrugating Co.* v *W. L. Thon Co.*, 307 Mich. 273, 11 N.W. 2d 886 (1943), which construed the 1905 Act:

> "The statute requires notice by materialmen within 60 days of the date of the furnishing of the last of [the] materials. This requirement could not be the subject of waiver by acts of the contractor and plaintiff" (materialman).

400 F. Supp. at 80, *quoting* 307 Mich. at 278, 11 N.W. 2d at 888.

Most of the argument before this court has concerned whether Hub was a subcontractor or whether it was, as the defendants claim, a materialman to a materialman to a subcontractor to a principal contractor, and hence without any right of recourse against Gust or Aetna on the bond. It suffices for our purposes here to observe that, in our opinion, Judge Harvey correctly applied the appropriate Michigan law to the undisputed facts of this case to hold that Hub was a subcontractor. We are not, however, as confident that this determination alone is dispositive of the issues

[4] The form of the bonding contract here appears tailored more to the Miller Act, 40 U.S.C. §270a *et seq.* (1970), establishing conditions for contractors' bonds upon the construction or repair of federal public buildings. The Miller Act, like the payment bond furnished by Aetna, requires persons lacking a contractual relationship with the prime contractor to provide a single notice to be given within 90 days from the date on which the last labor or material was supplied. 40 U.S.C. §270b(a).

raised by Count V. The 1963 Act, as far as we can ascertain, speaks solely in terms of "claimant", defined in Section 6 of the Act as "a person having furnished labor, material, or both, used or reasonably required for use in the performance of the contract. 'Labor and material' includes that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment directly applicable to the contract." M.C.L.A. §129.206, M.S.A. §5.2321(6). Unlike the 1905 Act, under which nearly all of the cases relied upon by the parties and the district court were decided, the 1963 Act makes no express distinction between subcontractors and materialmen insofar as the right to recover upon the payment bond is concerned, except to imply that there may be no right without giving the statutory notices unless a claimant has a "direct contractual relationship with the principal contractor". M.C.L.A. §129.207, M.S.A. §5.2321(7).

We are, therefore, led to the conclusion that Hub, while meeting the definition of subcontractor under pre-existing Michigan law, is not under the facts here a claimant having a direct contractual relationship with Gust, the principal contractor, within the meaning of Section 7 of the 1963 Act.[5] We therefore hold that plaintiff's status as a subcontractor here places it in no more or less favorable position with regard to the duty to provide notice than any other supplier on a public works project.[6] It seems a fair construction of the legislative intent that the Michigan legislature saw no benefit to the continuation of the distinction between materialmen and subcontractors when it came to affording the statutory protection of a payment bond. We, therefore, hold that under Michigan's statute, the plaintiff would normally have been required to furnish both notices required in Section 7(a) and (b) as a condition to recover upon the bond. As pointed

[5] The district court's opinion noted, and it is not disputed, that Hub lacked a direct contractual relationship with Gust. *See* 400 F. Supp. at 78.

[6] *See Charles W. Anderson Co.* v *Argonaut Ins. Co.*, 62 Mich App. 650, 233 N.W. 2d 691, *leave to appeal denied*, 395 Mich. 815 (1975) (applying the notice provisions of Section 7 to a subcontractor).

out by Judge Harvey and the parties, however, the express terms of the bond which was actually executed between Aetna and Gust required only the 90-day notice and we are, therefore, compelled to determine whether Hub's satisfaction of this requirement alone permits recovery or whether, as Judge Harvey held, the 30-day notice of the statute must also be met. In this respect we find unpersuasive the authorities upon which the district court relied.

In *Williamson* v *Williams, supra,* cited by the district court, 400 F. Supp. at 79-80, the surety and the principal contractor sought to escape liability for services furnished in the execution of a public construction contract by claiming that the bond as executed restricted liability to indebtedness arising from the principal contractor. Holding that liability also extended to claims for services furnished by laborers to a remote subcontractor, the court simply held, in accordance with pre-existing law,[7] that " 'where a bond is given under the authority of a statute, that which is not expressed but should have been incorporated is included in the bond.' " 262 Mich. at 404, 247 N.W. at 705, *quoting with approval Chambers* v *Cline,* 60 W. Va. 588, 55 S.E. 999 (1906) (syllabus). However, the Michigan Supreme Court in *Williamson,* 262 Mich. at 405, 247 N.W. at 705, cited with approval the following instructive quotation from *Baumann* v *City of West Allis,* 187 Wis. 506, 204 N.W. 907, 914 (1925):

> It is the contention of appellants that the liability sought to be imposed by the statute does not arise unless the provision required by the statute is actually inserted in the contract. . . . If this be the proper construction of the law, then the statute might just as well not have been passed, because such was the law before. Such a statute will be construed in the light of the conditions and circumstances which gave rise to the law, and to effectuate the purpose which the Legislature sought to accomplish. Having discovered that purpose, the law

[7] *August* v *Collins,* 260 Mich. 232, 244 N.W. 458 (1932).

> should be construed to give effect thereto. We entertain no doubt that it was the purpose of the Legislature to afford a remedy, in the nature of an action against the surety, to all subcontractors furnishing labor or material entering into the construction of public buildings and public works mentioned in this section of the statutes. This purpose may not be defeated by the voluntary act or by the oversight of the parties in failing to insert such a provision in the contract. The law imputes such provision to the contract whether written therein or not.

We believe, therefore, that while *Williamson* v *Williams, supra,* is authority for the more limited proposition that the statutory liability of a surety is mandatory and may not be restricted by the express language in the bond, it does not prevent a surety from assuming by contract, if it so desires, a broader liability than that contemplated by the Act. *People* ex rel. *Wheeling Corrugating Co.* v *W. L. Thon Co., supra,* also relied upon by the district court, concerned an action upon a bond in which it was conceded that notice had not been given until more than 60 days after the date of the last delivery of materials, the 60-day period being that which was specifically provided by the applicable statute, 1905 Mich. Pub. Act No. 187, as amended, *supra.* There the 60-day period was sought to have been waived by an agreement between the contractor and the materialman to the prejudice of the surety. It therefore comes as no surprise that the Michigan Supreme Court held that

> This requirement could not be the subject of waiver by acts of the contractor and plaintiff. We construe the phrase "including extension of time" as found in the condition of the bond to refer to the time of performance of the contract between the highway department and the principal contractor. The surety guarantees payment of materialmen during the period of performance. Notice of any such extension in the time of performance is waived by the surety. This has nothing to do with the requirement of notice within the 60-day period. Even if

> the time of performance on behalf of the principal contractor is extended, the materialmen must still give the notice within the prescribed period from the date the last of the materials are [sic] furnished.

307 Mich. at 278-79, 11 N.W. 2d at 888.

While it is altogether sensible to hold that a surety may not restrict its own liability to defeat the statutory purpose of requiring a bond and that a contractor and a materialman may not unilaterally stipulate to waive a condition of the bond to the prejudice of the surety, there seems no good reason in Michigan law or in common sense to hold that the surety itself may not provide for more generous or less restrictive coverage than the minimum required by the statute, and neither *Williamson* nor *Thon* provides the basis for such a claim. We therefore hold that the surety by its bonding contract may agree to accept a greater liability than that required under the Michigan bonding statute, although for reasons of public policy it may not contract for less. The statute specifically provides that the payment bond is solely for the benefit of the claimants,[8] and nothing suggests that the Act was intended to establish a ceiling as well as a floor upon the liability which a surety may undertake by contract. Because the bond here provided only for the 90-day notice and the trial court has correctly held that the plaintiff had complied in all respects with the conditions of the bond as written, plaintiff is entitled to recover upon it.[9] Although for

[8] The payment bond shall be in an amount fixed by the governmental unit but not less than 25% of the contract amount *solely for the protection of claimants*, as defined in section 6 [M.C.L.A. §129.206, M.S.A. §5.2321 (6)], supplying labor or materials to the principal contractor or his subcontractors in the prosecution of the work provided for in the contract.

M.C.L.A. §129.203, M.S.A. §5.2321(3) (emphasis added).

[9] No effort to reform the bond has ever been made, nor is there any allegation of mistake on the part of the surety company. Presumably, as in all such agreements, the consideration or premium for the bond reflected the risk taken. Thus, Aetna may have in fact commanded a more substantial fee for assuming a larger responsibility under the bond.

(Continued on Page 45)

somewhat different reasons than those relied upon by the court below, we therefore conclude that judgment was properly entered in favor of the plaintiff on Count V and perforce that it ought to have been entered upon Count I as well.

In a subsequent and unreported opinion, the district court awarded judgment to plaintiff upon Count II of the complaint, charging that Hub was the third-party beneficiary of the original construction contract between Gust and the school district and, derivatively, of the payment bond contract. *See generally* M.C.L.A. §600.1405, M.S.A. §27A.1405. In view of our decision to affirm the judgment on other grounds, we decline to address the propriety of the district court's ruling on Count II.

Hub, in its cross-appeal, asserts that the district court erred in failing to award it attorney fees. Neither the 1963 Michigan Public Works Bonding Act nor the third-party beneficiary statute, M.C.L.A. §600.1405, M.S.A. §27A.1405, makes any provision for the award of attorney fees. Hub claims first that the fees are proper by analogy to Michigan's Mechanics' Lien Act, M.C.L.A. §570.1 *et seq.*, M.S.A. §26.281 *et seq.* While we do not believe the comparison is well-taken, since the statute cited expressly provides for attorney fees, M.C.L.A. §570.12, M.S.A. §26.292, even under the Michigan Mechanics' Lien Act the award of attorney fees is a matter for the court's discretion and it is not claimed here that the trial judge abused his discretion in failing to make the award. Assuming that he had such discretion, we do not find it abused here.

Second, Hub claims that the appellants unduly lengthened the proceedings by failing to answer interrogatories and requiring it to resort to discovery. This

A final concern in a case of this nature is the very real danger that a claimant such as Hub will be misled to its prejudice by following the obligations of the bond rather than the 1963 Act. We do not believe that the Michigan Bonding Act, passed for the benefit of persons like Hub, was intended to serve as a trap for the unwary.

matter is peculiarly within the good judgment of the district court and again we cannot find that its discretion was abused.

Finally, Hub claims that it has a contractual right to recover the attorney fees by virtue of its alleged status as a third-party beneficiary of the principal contract, which provides that the school district shall not be liable for the payment of any costs or expenses of any suit by a claimant upon the bond. Even assuming this contractual provision contemplates the payment of attorney fees, we are unable to conclude that Hub was its intended beneficiary. Even if Hub is a third-party beneficiary of some portions of the contract, a question upon which we have reserved judgment above, it does not follow that Hub is entitled to "stand in the shoes" of the school district and receive the benefit of *all* of the provisions of the original contract. In short, Hub is not the "person for whose benefit [the attorney fees] promise is made by way of contract . . . ." M.C.L.A. §600.1405, M.S.A. §27A.1405.

Accordingly, the judgment of the district court is affirmed.